

**IN THE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,	)	
	)	
<i>Plaintiff,</i>	)	Civil No.: 99-0715 (TPJ)
	)	
v.	)	
	)	Filed: March 23, 1999
SBC COMMUNICATIONS INC. and	)	
AMERITECH CORPORATION,	)	
	)	
<i>Defendants.</i>	)	
	)	

**COMPETITIVE IMPACT STATEMENT**

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. NATURE AND PURPOSE OF THE PROCEEDING**

The United States filed a civil antitrust Complaint on March 23, 1999, alleging that the proposed acquisition of Ameritech Corporation ("Ameritech") by SBC Communications, Inc. ("SBC") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18 by lessening competition in the markets for wireless mobile telephone services in seventeen cellular license areas in Illinois, Indiana and Missouri. In these seventeen areas, which are identified in the Complaint as the "Overlapping Markets", Ameritech is one of two providers of cellular mobile telephone services.

The other provider of cellular mobile telephone services in the Overlapping Markets is either SBC or Comcast Cellular Corporation (“Comcast”), which SBC has entered into an agreement to acquire.

Shortly before the Complaint in this matter was filed, the Department and the defendants reached agreement on the terms of a proposed Final Judgment, which requires SBC and Ameritech to divest one of the cellular telephone systems in each of the Overlapping Markets.<sup>1</sup> In nine of the Overlapping Markets in Illinois and Indiana, the defendants can choose which cellular system to divest, but in the five Overlapping Markets in Missouri in the St. Louis area, as well as the three Overlapping Markets in Illinois where Comcast and Ameritech both own cellular systems, the Ameritech cellular systems must be the ones divested. The proposed Final Judgment also contains provisions, explained below, designed to minimize any risk of competitive harm that otherwise might arise pending completion of the divestiture. The proposed Final Judgment embodying the settlement, and a Stipulation by plaintiff and defendants consenting to its entry, were filed simultaneously with the Complaint.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (“APPA”). Entry of the proposed Final Judgment would terminate this action, except that the

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<sup>1</sup> The proposed Final Judgment describes the seventeen license areas containing overlapping cellular systems as the “Overlapping Cellular Markets.” That term has the same meaning as the “Overlapping Markets” referred to in the Complaint, and the two terms are used interchangeably herein.

Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof. The United States and the defendants have also stipulated that the defendants will comply with the terms of the proposed Final Judgment from the date of signing of the Stipulation, pending entry of the Final Judgment by the Court, permitting the required divestitures to be carried out and the acquisition to be consummated prior to completion of the APPA procedures. Should the Court decline to enter the Final Judgment, the defendants have also committed to continue to abide by its requirements until the expiration of time for any appeals of such ruling.

## **II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION**

### **A. The Defendants and the Proposed Transaction**

SBC and Ameritech are two of the remaining five Regional Bell Operating Companies (“RBOCs”) created in 1984 by the consent decree settling the United States’ antitrust case against American Telephone & Telegraph Co. SBC and Ameritech each provide local exchange telephone services in distinct regions, and also provide wireless mobile telephone services, including cellular mobile telephone services, both within and outside of their local exchange service regions.

SBC, with headquarters in San Antonio, Texas, is the second largest RBOC in the United States, with approximately 43 million total local access lines. In 1998, SBC had revenues in excess of \$28 billion. SBC provides local telephone services to retail customers in Arkansas, California, Connecticut, Kansas, Missouri, Nevada, Oklahoma, and Texas as well as cellular

mobile telephone services or other wireless mobile telephone services in those states. SBC also provides cellular mobile telephone services or other wireless mobile telephone services in some areas outside its local exchange service region, including the District of Columbia and areas within the states of Illinois, Indiana, Maryland, Massachusetts, Rhode Island, New York, Virginia, and West Virginia. SBC, through its Cellular One cellular systems out of region and its in-region Southwestern Bell, Pacific Bell, Nevada Bell and SNET cellular or other wireless mobile systems, is the nation's third largest wireless mobile telephone service provider, serving areas with a total population of about 82 million, and it has about 6.5 million subscribers nationwide.

Ameritech, with headquarters in Chicago, Illinois, is the fourth largest RBOC in the United States, with approximately 24 million total local access lines. In 1998, Ameritech had revenues in excess of \$17 billion. Ameritech provides local telephone service to retail customers in Illinois, Indiana, Michigan, Ohio, and Wisconsin, and also provides cellular mobile telephone service in these states, as well as in some states outside its local exchange service region including Missouri and Hawaii. Ameritech is a major wireless mobile telephone service provider, serving areas with a total population of about 30 million, and it has about 3.2 million subscribers nationwide.

On May 10, 1998, SBC and Ameritech entered into a purchase agreement, the Agreement and Plan of Merger, whereby SBC would acquire Ameritech in exchange for SBC stock valued at approximately \$58 billion dollars at the time of the agreement. Defendants filed a notification

of this transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, on July 20, 1998.

SBC has also entered into an agreement as of January 19, 1999, to acquire Comcast Cellular Corporation for \$1.67 billion, which would give SBC all of Comcast's cellular telephone systems. Notification of this transaction also was filed pursuant to the Hart-Scott-Rodino Antitrust Improvements Act. By acquiring Comcast's cellular telephone systems, SBC would become a provider of cellular mobile telephone services in additional areas in Delaware, Illinois, Indiana, New Jersey, and Pennsylvania. The acquisition of the Comcast cellular systems would add about 800,000 subscribers to SBC's total of wireless subscribers nationwide.

If both transactions were consummated, the combined total of SBC's and Ameritech's cellular and other wireless mobile telephone service subscribers would be 10.5 million, including the number of subscribers SBC would receive from its acquisition of Comcast.

## **B. Wireless Mobile Telephone Services**

Wireless mobile telephone services permit users to make and receive telephone calls, using radio transmissions, while traveling by car or by other means. The mobility afforded by this service is a valuable feature to consumers, and cellular and other wireless mobile telephone services are commonly priced at a substantial premium above landline services. In order to provide this capability, wireless carriers must deploy an extensive network of switches and radio

transmitters and receivers, and interconnect this network with the networks of local and long distance landline carriers, and with the networks of other wireless carriers. In 1998, revenues from the sale of wireless mobile telephone services totaled approximately \$30 billion in the United States.

Initially, wireless mobile telephone services were provided principally by two cellular systems in each license area, as was the case in the Overlapping Markets. Cellular licenses were awarded by the Federal Communications Commission (“FCC”) beginning in the early 1980s, within any given Metropolitan Statistical Area (“MSA”) or Rural Service Area (“RSA”).<sup>2</sup> Providers of Specialized Mobile Radio (“SMR”) services typically were also authorized to operate with some additional spectrum in these areas, including the Overlapping Markets.

In 1995 the FCC allocated (and subsequently issued licenses for) additional spectrum for the provision of PCS, a category of services which includes wireless mobile telephone services comparable to those offered by cellular carriers. In 1996 one SMR spectrum licensee began to use its SMR spectrum to offer wireless mobile telephone services, comparable to that offered by cellular providers and bundled with dispatch services, in a number of areas including some of the Overlapping Markets. The areas for which PCS providers are licensed differ from the cellular

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<sup>2</sup> 25 MHZ of spectrum was allocated to each cellular system in an MSA or RSA. MSAs are the 306 urbanized areas in the United States defined by the federal government, used by the FCC to define the license areas for urban cellular systems. RSAs are the 428 areas defined by the FCC used to define the license areas for rural cellular systems outside of MSAs.

MSAs and RSAs but overlap with them.<sup>3</sup> However, in many areas, including the Overlapping Markets, not all of the PCS license holders have started to offer services or have even begun to construct the facilities necessary to begin offering service. The PCS providers have tended to enter first in the largest cities, entering in smaller markets only later and not to as great an extent. Moreover, even in those areas where one or more PCS providers have constructed their networks and have started to offer service or some SMR spectrum is also used for wireless mobile telephone services, including the Overlapping Markets, the incumbent cellular providers, such as SBC and Ameritech, still typically control the great majority of the market.

### **C. Anticompetitive Consequences of the Proposed Acquisition**

SBC and Ameritech are the sole providers of cellular mobile telephone services, and the two primary providers of all wireless mobile telephone services, in fourteen cellular license areas in the states of Illinois, Indiana, and Missouri. These fourteen areas are referred to in the Complaint as the “SBC/Ameritech Overlapping Markets.” SBC and Ameritech are direct competitors in the markets for wireless mobile telephone services in the SBC/Ameritech Overlapping Markets.

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<sup>3</sup> There can be as many as three PCS providers, with 30 MHZ of spectrum each, authorized to serve areas considerably larger than a single MSA or RSA. In addition, there can be as many as three PCS providers, with 10 MHZ of spectrum each, licensed to provide service in smaller areas that overlap more closely with a given MSA or RSA.

In three cellular license areas in the state of Illinois, the cellular systems owned entirely or in part by Ameritech and Comcast are the sole providers of cellular mobile telephone services, and the two primary providers of all wireless mobile telephone services. These three areas, which are in addition to the fourteen cellular license areas where Ameritech and SBC own overlapping cellular systems, are referred to in the Complaint as the “Comcast/Ameritech Overlapping Markets.” Comcast and Ameritech are direct competitors in the markets for wireless mobile telephone services in the Comcast/Ameritech Overlapping Markets. SBC already manages the Comcast cellular systems in the Comcast/Ameritech Overlapping Markets. When the Comcast acquisition is consummated, SBC and Ameritech will own, entirely or in part, the overlapping cellular systems in these additional three cellular license areas in the state of Illinois.

In the Overlapping Markets, the population potentially addressable by cellular mobile telephone systems totals about 11 million, including over 10.8 million in the SBC/Ameritech Overlapping Markets and nearly 200,000 in the Comcast/Ameritech Overlapping Markets. The Overlapping Markets are listed below:

**SBC/Ameritech Overlapping Markets**

**MSAs**

Chicago, IL  
St. Louis, MO-IL  
Gary-Hammond-East Chicago, IN  
Springfield, IL  
Champaign-Urbana-Rantoul, IL  
Bloomington-Normal, IL  
Decatur, IL



**RSAs**

Illinois 2 -- Bureau  
Illinois 5 -- Mason  
Illinois 6 -- Montgomery  
Missouri 8 -- Callaway  
Missouri 12 -- Maries  
Missouri 18 -- Perry  
Missouri 19 -- Stoddard

**Comcast/Ameritech Overlapping Markets****MSAs**

Joliet, IL  
Aurora-Elgin, IL  
Kankakee, IL (Comcast has a 10.07% interest in this cellular system)

If SBC's plan to acquire Ameritech were consummated, only one provider of cellular mobile telephone services would remain available to consumers in the Overlapping Markets. SBC would own both cellular systems in the SBC/Ameritech Overlapping Markets. In addition, because SBC already manages the Comcast cellular systems in Illinois, SBC would operate both of the cellular systems in the Comcast/Ameritech Overlapping Markets if SBC were to acquire Ameritech. If both the Comcast and Ameritech acquisitions were consummated, SBC would own, entirely or in part, both of the cellular systems in the Comcast/Ameritech Overlapping Markets.

Therefore, SBC's acquisition of Ameritech would cause the level of concentration among firms providing wireless mobile telephone services in the Overlapping Markets to increase significantly. Already a high level of concentration in the provision of wireless mobile telephone services exists in the Overlapping Markets. In the SBC/Ameritech Overlapping Markets, the individual market shares of SBC and Ameritech, measured on the basis of the

numbers of subscribers or wireless lines served, range from 30% to over 50%. The combined market share of SBC and Ameritech in the provision of wireless mobile telephone services is in the range of 80 to 90%, taking into account other operational wireless mobile competitors.<sup>4</sup> As measured by the Herfindahl-Hirschman Index (HHI), which is commonly employed by the Department of Justice in merger analyses and is explained in more detail in Appendix A to the Complaint, concentration in these markets is already in the range of 3200 to 4100, well above the 1800 threshold at which the Department normally considers a market to be concentrated. After the merger, the HHI in these markets will greatly increase and will range from 6400 to 8100. In the Comcast/Ameritech Overlapping Markets, the combined market share of Comcast and Ameritech similarly is much larger than that of all other wireless mobile competitors, and the merger would similarly lead to large increases in concentration.

Competition between SBC and Ameritech, and between Comcast and Ameritech, as the two largest providers of wireless mobile telephone services in the Overlapping Markets, has resulted in lower prices and higher quality of service in these markets than would otherwise have existed absent such competition. If SBC and Ameritech were to merge, the competition between SBC and Ameritech and between Comcast and Ameritech in wireless mobile telephone services in these markets would be eliminated, and competition overall for wireless mobile

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<sup>4</sup> The United States has used subscriber data here to estimate market shares because those data are more readily available. In some contexts, however, other measures of market share may provide a more precise indication of market concentration or a firm's competitive significance. The use of subscriber data here is reasonable, given that measuring market share in other ways would not affect the Department's conclusions. The market shares of SBC and Ameritech would also be very high if measured on a variety of dimensions other than subscribers or lines served, such as revenues or volumes of traffic handled.

telecommunications services would be substantially lessened in the Overlapping Markets by SBC's acquisition of Ameritech. As a result of the loss in competition between SBC and Ameritech, and between Comcast and Ameritech, there would be an increased likelihood both of unilateral actions by the combined firm in these markets to increase prices, diminish the quality or quantity of service provided, or refrain from making investments in network improvements, and of coordinated interaction among the limited number of remaining competitors that could lead to similar anticompetitive results.

Competition would also be adversely affected in another, related way by the consummation of SBC's acquisition of Ameritech. In the SBC/Ameritech Overlapping Markets in the St. Louis area, including the St. Louis MSA and the four RSAs in Missouri, Ameritech planned, prior to its announcement of its agreement to be acquired by SBC, to provide local exchange and long distance telephone services in SBC's local telephone service area. Ameritech would have competed with SBC primarily by selling bundled packages of such local exchange and long distance telephone services, together with its cellular mobile telephone service, to existing Ameritech residential cellular customers. There is no alternative source of such a bundled product in the St. Louis area at present. Ameritech expected that its plan would enhance its ability to retain existing cellular customers. Ameritech had made extensive preparations for entry, over the course of more than a year, and was ready to begin providing local exchange and long distance telephone services to its cellular mobile telephone customers at the time it agreed to be acquired by SBC. Shortly thereafter, because it was being acquired by SBC, Ameritech decided not to implement its local exchange and long distance entry plans in the St. Louis area.

The consummation of SBC's acquisition of Ameritech thus would preclude such competition by Ameritech.

It is unlikely that entry within the next two years into wireless mobile telephone services in the Overlapping Markets would be sufficient to mitigate the competitive harm resulting from this acquisition, if it were to be consummated.

For these reasons, the United States concluded that the merger as proposed may substantially lessen competition, in violation of Section 7 of the Clayton Act, in the provision of wireless mobile telephone services in the Overlapping Markets.

### **III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

#### **A. The Divestiture Requirement**

The proposed Final Judgment will preserve competition in the sale of mobile wireless services in the Overlapping Markets by requiring the defendants to divest one of their two cellular telephone systems in each of the Overlapping Markets. This divestiture will eliminate the change in market structure caused by the merger.

The divestiture requirements of the proposed Final Judgment, as stated in Sections IV.A and II.B, direct Ameritech to divest its cellular telephone systems in St. Louis and other markets in Missouri, as well as its cellular telephone systems in the three markets in Illinois where it

overlaps with Comcast. In the remaining markets in Illinois and Indiana where SBC's and Ameritech's cellular telephone systems overlap, SBC and Ameritech may choose which of the two systems in each market must be divested. Section IV.C permits the different cellular systems in separate Overlapping Cellular Markets to be divested to different purchasers, but requires that, for any individual cellular system, the Cellular System Assets be divested entirely to a single purchaser, unless the United States otherwise consents in writing.

In the Comcast/Ameritech Overlapping Markets, because Comcast is not a party to the consent decree, the necessary divestitures to avoid loss of competition between the overlapping cellular systems could be effected only through Ameritech. Comcast was not considered a necessary party to this action because SBC's acquisition of Comcast, standing alone, is not a competitive problem. A violation of Section 7 of the Clayton Act only arises in the three Comcast/SBC Overlapping Markets when the Comcast acquisition is considered together with SBC's merger with Ameritech.

The reason for requiring the divestiture of the five Ameritech cellular systems in the St. Louis area is different, arising from Ameritech's plans prior to the merger to compete with SBC in providing local exchange and long distance telephone services together with its cellular mobile telephone services in St. Louis. Ameritech had made extensive preparations to provide local exchange and long distance services in SBC's local telephone service area, over the course of the year preceding the announcement of the merger, and was ready to launch its bundled offering of these services together with cellular telephone service at the time the merger was

announced. In contrast, the SBC cellular systems in the St. Louis area, being owned by the incumbent local telephone service provider, had made no preparations to offer local exchange telephone service competition in any of the relevant markets in Missouri.

The loss of competition in cellular mobile telephone services between the Ameritech and SBC cellular systems in Missouri, standing alone, required one of the two cellular systems to be divested, as in the other Overlapping Markets. However, a buyer of the Ameritech cellular systems would be much more favorably positioned to enter rapidly into local exchange and long distance telephone services in St. Louis and provide a bundled product together with its cellular services than would a buyer of the SBC cellular systems in the St. Louis area. Therefore, in order to remedy this aspect of the competitive harm arising from the merger, the United States concluded that the divestiture of the Ameritech cellular systems in the St. Louis area, together with “those assets acquired, developed, used or intended for use in connection with the provision of local exchange telecommunications services and long distance telecommunications services by such systems[s],” would be necessary, as required by Section II.B of the proposed Final Judgment.

The proposed Final Judgment’s divestiture provisions are intended to accomplish the “complete divestiture of the entire business of one of the two cellular systems in each of the Overlapping Cellular Markets,” as Section II.B states. Section II.B also specifies in detail the types of assets to be divested, which collectively are described throughout the consent decree as “Cellular System Assets,” and addresses some special circumstances concerning the divestiture

of those assets. In all of the Overlapping Markets, Cellular System Assets means all types of assets, tangible and intangible, used by defendants in the operation of each of the cellular systems to be divested, including the provision of long distance telecommunications service for wireless calls. For the five Ameritech cellular systems to be divested in the St. Louis area, additional types of assets related to Ameritech's plans for providing local exchange and long distance telecommunications services are also included, as described above. Section II.B enumerates in detail, without limitation, particular types of assets covered by the divestiture requirement.

For the most part, the divesting defendant is required to transfer to the purchaser the complete ownership and/or other rights to the Cellular System Assets. However, the merged firm will retain a number of other cellular systems in areas that do not overlap, and prior to the merger each defendant may have had certain assets that were used substantially in the operations of its overall cellular business and that must be retained to some extent to continue the existing operations of the cellular properties not being divested. Section II.B permits special divestiture arrangements for such assets either if they are not capable of being divided between the divested and retained cellular systems, or if the divesting defendant and the purchaser agree not to divide them. For these assets, the divestiture requirement is satisfied if the divesting defendant grants to the purchaser, at the election of the purchaser, an option to obtain a non-exclusive, transferable license for a reasonable period to use the assets in the operation of the cellular system being divested, so as to enable the purchaser to continue to operate the divested cellular systems without impairment. None of the Cellular System Assets associated with Ameritech's

plans to provide local exchange and long distance telecommunications service in the St. Louis area are covered by this licensing requirement, because all of those assets are required to be transferred completely to the purchaser.

The definition of Cellular System Assets in Section II.B contains the special provisions relating to intellectual property. One addresses intellectual property rights that defendants may have under third-party licenses that could not be transferred to a purchaser entirely or by license without the consent of the third-party licensor. If any such assets are used by the cellular systems being divested, defendants must identify them in a schedule submitted to plaintiff and filed with the Court as expeditiously as possible following the filing of the Complaint, in any event, prior to any divestiture and before the Court approves the proposed Final Judgment. Defendants must explain the necessary consents and how a consent would be obtained for each asset. This proviso is not intended to afford defendants any opportunity to withhold intellectual property rights over which they have any control, which could impair the ability of a purchaser to use the divested cellular system to compete effectively. It relates only to intellectual property assets that defendants have no power to transfer themselves, and defendants must do all that is possible to transfer the entire business of the divested cellular systems. To make this clear, Section IV.G obligates defendants to cooperate with any purchaser as well as a trustee, if any, to seek to obtain the necessary third- party consents, if any assets require such consents before they may be transferred to a purchaser.



The second proviso relates to certain specific trademarks, trade names and service marks. Section II.B, defining the Cellular System Assets to be divested, generally requires the divestiture of trademarks, trade names and service marks, with the four specified exceptions of ones containing “SBC”, “Southwestern Bell”, “Ameritech”, or “Cellular One,” which are the names under which the defendants’ retained cellular systems, or their corporate parents, do business. Such trademarks, trade names and service marks, like other assets, are either to be divested in their entirety or in the case of such marks and names that must be retained to continue the existing operations of defendants’ remaining cellular properties, and that are not capable of being divided or that the divesting defendant and purchaser agree not to divide, are to be made available to the purchaser through a non-exclusive, transferable license. Section II.B therefore creates an obligation on the part of SBC and Ameritech to license the “Clearpath” trade name, currently used in connection with Ameritech’s digital cellular services, to a purchaser of Cellular System Assets currently owned by Ameritech. The Department has been advised by Ameritech, and recognizes on that basis, that (1) Ameritech’s use of the trade name “Clearpath” is subject to a letter agreement between Ameritech and Unisys Corporation; (2) any use by a purchaser of Ameritech Cellular System Assets would be pursuant to a license agreement which the purchaser would need to enter into with SBC and/or Ameritech; and (3) such a license agreement would need to contain terms and conditions that would protect SBC and Ameritech from claims by Unisys related to the use of that trade name.

Section IV contains other provisions to facilitate divestiture, including notification of the availability of the Cellular System Assets for purchase in Section IV.D, access to information

about the Cellular System Assets in Section IV.E, and preservation of records in Section IV.H. In addition, to ensure that a purchaser will be able to operate the divested cellular systems without impairment, Section IV.F prohibits defendants from interfering with a purchaser's negotiations to retain any employees who work or have worked since the date of the announcement of the merger with the Cellular System Assets, or whose principal responsibility relates to the Cellular System Assets.<sup>5</sup>

## **B. Timing of Divestiture**

In antitrust cases involving mergers in which the United States seeks a divestiture remedy, it requires completion of the divestiture within the shortest time period reasonable under the circumstances. The proposed Final Judgment in this case requires, in Section IV.A, that the divestitures of the Cellular System Assets in the seventeen Overlapping Cellular Markets to a purchaser or purchasers approved by the United States must be completed within 180 days of the time that SBC and Ameritech consummate their merger, or the time that they receive the final regulatory approvals from the FCC and state regulatory commissions that are necessary preconditions to consummation of the merger, whichever is earlier. These alternative starting dates were chosen because, at the time SBC and Ameritech entered into the Stipulation and agreed to the proposed Final Judgment, the FCC and two state regulatory commissions, the Illinois Commerce Commission and the Ohio Public Utilities Commission, were still reviewing

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<sup>5</sup> There is a limited exception for employees working with the Cellular System Assets solely on a temporary basis from another part of SBC or Ameritech.

SBC's acquisition of Ameritech. The approval of these three regulatory bodies is necessary for the acquisition to be consummated.<sup>6</sup> If SBC's acquisition of Ameritech were not consummated because any of those regulatory bodies denied the necessary approval, defendants would not be required to divest their cellular systems in the Overlapping Markets.

Even though approval by these three regulatory bodies is a necessary precondition for the merger to be consummated, after an initial favorable decision by any of those regulatory bodies, a brief period of time would exist for reconsideration before the decision would become final. Defendants could agree to consummate their merger based on the initial decisions, before the period for reconsideration has run. Therefore, the time for divestiture has been linked to the first event that would allow the acquisition to take place, either the last of the three necessary final regulatory approvals or a decision by the defendants to consummate the merger without any or all of these final regulatory approvals.

Defendants are also required by Section IV.B to use their best efforts to accomplish the divestitures of the Cellular System Assets in the Overlapping Cellular Markets to a purchaser or purchasers at or before the consummation of the merger of SBC and Ameritech, and to do so as expeditiously as possible, including obtaining all required regulatory approvals.

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<sup>6</sup> The merger is also being reviewed by other state telecommunications regulators, e.g., in Indiana, but the United States understands that prior approval by other state regulators is not necessary for the merger to proceed.

In addition, the proposed Final Judgment requires in Section IV.B that defendants comply with all of the applicable rules of the FCC in carrying out the divestitures. These rules include 47 C.F.R. § 20.6 (spectrum aggregation) and 47 C.F.R. § 22.942 (cellular cross-ownership).<sup>7</sup> These FCC requirements may add to, but cannot subtract from or impair, the requirements of this proposed Final Judgment, since Section IV.B specifies that authorization by the FCC to conduct divestiture of a cellular system in a particular manner will not modify any of the requirements of the decree. The provisions of the proposed Final Judgment have been designed to avoid any conflict with the FCC's rules. In particular, the inclusion of the trusteeship requirements discussed below ensures that impermissible control of both cellular systems by the merged company should not arise even if defendants were to consummate their merger during the 180-day period authorized for divestiture, at a time when some of the cellular systems have not yet been sold to any purchaser approved by the Department of Justice. Since the FCC's approval is required for the transfer of the cellular system licenses to a purchaser, Section IV.A provides one exception to the 180-day divestiture period. If applications for transfer of a cellular license have been filed by the FCC within the 180 day period, but the FCC has not granted approval before the end of that time, the period for divestiture of the specific Cellular System Assets covered by the license that cannot yet be transferred shall be extended

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<sup>7</sup> The FCC's spectrum aggregation rules, in 47 C.F.R. § 20.6, do not permit a licensee to have an attributable interest in more than 45 MHz of spectrum licensed for cellular, PCS or SMR with significant overlap in any geographic area. The FCC will attribute an interest if it is controlling, or if in most cases it is 20% or more of the equity, outstanding stock or voting stock of the licensee. The FCC's cellular cross-ownership rules, in 47 C.F.R. § 22.942, also prohibit a licensee or any person controlling a licensee from having a direct or indirect ownership interest of more than 5% in both cellular systems in an overlapping cellular geographic service area, unless such interests pose "no substantial threat to competition."

until five days after the FCC's approval is received. This extension is to be applied only to the individual cellular system affected by the delay in approval of the license transfer and does not entitle defendants to delay the divestiture of any other Cellular System Assets for which license transfer approval has been granted.

### **C. Use of a Trustee Subsequent to Consummation of the Acquisition**

The proposed Final Judgment provides in Section IV.A that, at or before the time that SBC and Ameritech consummate their merger, they must divest the Cellular System Assets in each of the Overlapping Cellular Markets, either to purchasers acceptable to plaintiff in its sole discretion, or to a trustee designated pursuant to Section V of the Final Judgment. As part of this divestiture, SBC and Ameritech must relinquish any direct or indirect financial ownership interests and any direct or indirect role in management or participation in control. Thus, if SBC and Ameritech want to consummate their merger before they have completed the divestitures of Cellular System Assets to approved purchasers, by the time of consummation, they must have transferred any remaining Cellular System Assets to a trustee chosen by the Department of Justice. Pursuant to Section V of the proposed Final Judgment, the trustee will own and control the systems until they are sold to a final purchaser, subject to safeguards to prevent SBC and Ameritech from influencing their operation.

This trust arrangement is an option available to defendants, to enable them to consummate their merger once all regulatory approvals have been received, even if the 180-day

period for divestitures has not yet run and some Cellular System Assets that must be divested have not yet been purchased. It is not the preferred option, however, as indicated by the requirement in Section IV.B that defendants use their best efforts to accomplish the divestitures before consummation of the merger. The overall period of 180 days to complete the divestitures continues to apply, whether the divestitures are made by SBC and Ameritech or by the trustee. In other words, the transfer of any Cellular System Assets to the trustee does not extend the time to complete the divestitures. The trustee simply has whatever part of the 180-day period remains from the time SBC and Ameritech transfer the cellular systems. If, for any reason, the trustee has not completed all of the required divestitures to purchasers within this period, the trustee is required, under Section V.F, to report to the Court on the efforts made and the reasons why divestiture has not been accomplished, but the trust period may be extended by the Court only if plaintiff agrees to the period involved.

Section V details the requirements for the establishment of the trust, the selection and compensation of the trustee, the responsibilities of the trustee in connection with divestiture and operation of the Cellular System Assets, and the termination of the trust. If defendants have not divested all of their Cellular System Assets in the Overlapping Cellular Markets to approved purchasers by the time of consummation of the merger, Section V.A requires that before consummating the merger: (1) defendants must have notified the United States which Cellular System Assets in each Overlapping Market will be divested; (2) the Court must have appointed a trustee, which shall be selected by the United States; (3) defendants must have submitted a form of Trust Agreement consistent with the terms of the Final Judgment, and the form agreement

must have received approval by the United States; and (4) after receiving FCC approval for the license transfers, defendants must irrevocably divest the unsold Cellular System Assets to the trustee. As a practical matter, the process of establishing a trust arrangement for any Cellular System Assets will take some time, so if defendants plan to make use of this option, they will need to begin preparations for it soon after the 180 days has begun to run.

The trustee will have the obligation and the sole responsibility, under Section V.B, for the divestiture of any transferred Cellular System Assets. The trustee has the authority to accomplish divestitures at the earliest possible time and “at the best price then obtainable upon a reasonable effort by the trustee.” The defendants are not entitled to object to divestiture based on the adequacy of the price the trustee obtains or any other ground, unless the trustee’s conduct amounts to malfeasance. The terms of the trustee’s compensation, under Section V.C, will provide incentives based on the price and terms of the divestiture and the speed with which it is accomplished. As provided by Sections V.B and V.C., defendants will pay the compensation and expenses of the trustee, and of any investment bankers, attorneys or other agents that the trustee finds reasonably necessary in his judgment to assist in the divestiture and the management of the Cellular System Assets.

The trusteeship mechanism has been used by the FCC, in a variety of contexts, to provide a short period of time in which to complete a sale of a spectrum licensee that must be divested, while permitting the broader merger or acquisition that necessitates the divestiture to go forward. In this context, the critical feature of the trusteeship arrangement is that the trustee will not only

have responsibility for sale of the Cellular System Assets, but will also be the authorized holder of the cellular system license, with full responsibility for the operations, marketing and sales of the cellular system to be divested, and will not be subject to any control or direction by defendants. The defendants will no longer have any role in the ownership, operation or management of the Cellular System Assets to be divested following consummation of their merger, as provided by Section V.G, other than the right to receive the proceeds of the sale, and certain obligations to provide cooperation to the trustee in order to complete the divestiture, as indicated in Section V.D. Defendants are precluded under Section V.G from communicating with the trustee, or seeking to influence the trustee, concerning the divestiture or the operation and management of the cellular systems transferred, apart from the limited communications necessary to carry out the Final Judgment and to provide the trustee with the necessary resources and cooperation to complete the divestitures. Defendants and the trustee are subject to an absolute prohibition on exchanging any non-public or competitively sensitive marketing, sales or pricing information relating to either of the cellular system businesses in the Overlapping Markets. These safeguards will protect against any competitive harm that could arise from coordinated behavior or information sharing between the two cellular systems after the merger, during the limited period while sale of the Cellular System Assets is not yet complete. They ensure that the trusteeship arrangement is consistent with the FCC's rules.



#### **D. Criteria for the United States' Approval of Purchasers**

Under the proposed Final Judgment, the United States has an important role in the approval of purchasers for each of the divested cellular systems, to ensure that the purchasers chosen by the defendants or the trustee are adequate from a competitive viewpoint. The United States' approval or rejection of a purchaser is at its sole discretion, as Section IV.A specifies, but the consent decree also embodies certain criteria that the United States will apply in making the approval decision.

Specifically, Section IV.C of the proposed Final Judgment requires that the divestitures of Cellular System Assets be made to a purchaser or purchasers for whom it is demonstrated to plaintiff's sole satisfaction that: (1) the purchaser(s) has the capability and intent of competing effectively in the provision of cellular mobile telephone service using the Cellular System Assets; (2) the purchaser(s) has the managerial, operational and financial capability to compete effectively in the provision of cellular mobile telephone service using the Cellular System Assets; (3) with respect to the purchaser of the Cellular System Assets in the St. Louis Area, if such Cellular System Assets are divested to the purchaser by Ameritech rather than by the trustee, the purchaser has the capability of competing effectively in the provision of local exchange telecommunications services and long distance telecommunications services in the St. Louis Area, and (4) none of the terms of any agreement between the purchaser(s) and either of the defendants shall give defendants the ability unreasonably (i) to raise the purchaser(s)'s costs, (ii) to lower the purchaser(s)'s efficiency, (iii) to limit any line of business which a purchaser(s)

may choose to pursue using the Cellular System Assets (including, but not limited, to entry into local telecommunications services on a resale or facilities basis or long distance telecommunications services on a resale or facilities basis), or otherwise to interfere with the ability of the purchaser(s) to compete effectively.

All of these criteria must be satisfied whether the divestiture is accomplished by defendants or the trustee, with the exception of (3), which applies only to divestitures made by defendants and not if the trustee assumes control over the Cellular System Assets in the St. Louis Area. In the case of any divestiture, by defendants or the trustee, it is important to ensure that the ongoing cellular businesses go to purchasers with the capability and intent of operating them as effective competitors in the lines of business they already serve, and that there are no conditions restricting competition in the terms of the sale. The United States, however, viewed the issue of potential competition in local exchange and long distance telecommunications services in the St. Louis area somewhat differently. Defendants have incentives to divest Ameritech's Missouri cellular properties in a way that could minimize the risk of their use for such competition to SBC, while a trustee charged with seeking the best price obtainable would not have similar incentives. Also, the United States has sought only to ensure that the purchaser of Ameritech's St. Louis-area cellular systems would have the capability to compete effectively in these additional lines of business; it has not insisted on proof of intent to compete. Such claims of intent are inherently less subject to verification when dealing with a new line of business, and, unlike the situation with an ongoing profitable business, a purchaser could reasonably decide to enter local exchange and long distance telecommunications services in St.

Louis in a somewhat different way than Ameritech had planned to do, or not to pursue those lines of business, depending on their economic attractiveness.

In exercising its sole discretion to approve a purchaser under Section IV.C, the United States will take into account the following considerations. In evaluating the capability of a purchaser to provide cellular mobile telephone service under (1) or (2), or local exchange telecommunications services and long distance telecommunications services under (3), the United States will consider the capabilities not only of the immediate purchaser of Cellular System Assets, but also of any parent, subsidiary, corporate affiliate or partner of the immediate purchaser, to the extent that the United States is satisfied that such capabilities of related entities would actually be available to the immediate purchaser to provide the services. Moreover, in evaluating a purchaser's capability to provide services under (1), (2), or (3), the United States will consider all of the assets and capabilities of the purchaser (including their affiliated entities where it is appropriate to take these into account, as discussed above) that are actually available at present to provide the relevant services, including, without limitation, financial assets, the assets being acquired from SBC and/or Ameritech, and the experience of members of the purchaser's management team. The capability to compete effectively in providing both local exchange service and long distance service under (3) can be on either a resale or facilities basis. The United States would look most favorably, in assessing capability, on those purchasers (including their affiliated entities where these are appropriate to take into account, as discussed above) that have significant experience in providing cellular mobile telephone service for purposes of (1) and (2), and on those purchasers that have significant experience in providing

local exchange and long distance services for purposes of (3). Conversely, a purchaser without such experience would need to make a more compelling demonstration to satisfy the United States. The United States' evaluation of a purchaser with limited or no experience in providing the relevant services would take into account the nature and extent of efforts made by the defendants (or trustee, if applicable) to find purchasers with more substantial experience. A conclusion by the United States that a purchaser satisfies (1) and (2) is relevant to whether (3) is also satisfied, but not determinative, since (3) represents an additional requirement that must be met by a purchaser of the St. Louis Area Cellular System Assets. No single factor or group of factors is determinative in the United States' exercise of its sole discretion in evaluation of a purchaser, and none of these considerations necessarily predetermines the outcome of the United States' review of any particular purchaser.

#### **E. Other Provisions of the Decree**

Section III specifies the persons to whom the Final Judgment is applicable, and provides for the Final Judgment to be applicable to certain Interim Parties to whom defendants might transfer the Cellular System Assets, other than purchasers approved by the United States.

Section VI obliges defendants, or the trustee if applicable, to notify the United States of any planned divestiture of Cellular System Assets within two business days of executing a binding agreement with a purchaser. It enables the United States to obtain information to evaluate the chosen purchaser as well as other prospective purchasers who expressed interest and

establishes a procedure for the United States to notify defendants and the trustee whether it objects to a divestiture. The United States' notification of its lack of objection is necessary for a divestiture to proceed. This section also provides for an objection by defendants to a sale by the trustee under the limited situation of alleged malfeasance, but in that case it is possible for the Court to approve a sale over defendants' objection.

Section VII establishes affidavit requirements for defendants to report to the United States on their compliance with the proposed Final Judgment, their activities in seeking to divest the Cellular System Assets prior to consummating their merger, and their actions to preserve the Cellular System Assets to be divested. Under V.E, the trustee also has monthly reporting obligations concerning the efforts made to divest the Cellular System Assets.

Section VIII prohibits defendants from financing all or any part of a purchase made by an acquirer of the Cellular System Assets, whether the divestiture is carried out by defendants or by the trustee.

Section IX, the Hold Separate Order, contains important requirements concerning the operation of the cellular systems before divestiture is complete, and the preservation of the Cellular System Assets as a viable, ongoing business. The obligations of Section IX.A fall on both defendants and both cellular systems in any Overlapping Market, obliging them to ensure that such cellular systems continue to be operated as separate, independent, ongoing, economically viable and active competitors to the other cellular system and all other wireless

mobile telecommunications providers in the same area. Section IX.A requires separation of the operations of the two cellular systems and their books, records and competitively sensitive information. The requirements of Section IX.A both serve to ensure that defendants maintain their two cellular systems in the Overlapping Markets as fully separate competitors prior to consummating their merger, notwithstanding their expectations that the merger will take place, and reinforce the provisions of Section V.G concerning the separation of defendants and the trustee after the merger is consummated but while there are still Cellular System Assets awaiting sale.

Because SBC already operates the three Comcast systems in the Comcast/Ameritech Overlapping Markets, and the hold separate requirements of Section IX.A of the Final Judgment apply to “each of the cellular systems” that either defendant “owns or operates” in the Overlapping Markets, SBC is obliged to ensure that the three Comcast systems are operated in a way that complies with Section IX.A, pending divestiture of the Ameritech systems in these areas to purchasers approved by the Department of Justice.

Section IX.B, in contrast, applies only to the Cellular System Assets to be divested and to the period before consummation of the merger, while defendants still control those assets. It requires the defendant whose assets will be divested (or both, if it has not yet been decided which system will be divested in a particular market) to take certain specified steps to preserve the assets in accordance with past practices. These steps include maintaining and increasing sales, maintaining the assets in operable condition, providing sufficient credit and working

capital, not removing the assets, not terminating, transferring or reassigning employees who work with the assets (with certain limited exceptions), and not taking any actions to impede or jeopardize the sale of the assets. Section IX.C similarly obliges defendants not to take any actions that would impede or jeopardize the sale of the assets after the merger has been consummated but while Cellular System Assets remain in the control of a trustee. Finally, Section IX.D obliges each defendant, during the period while they still control Cellular System Assets, to appoint persons not affiliated with the other defendant to oversee the Cellular System Assets to be divested and to be responsible for compliance with the Final Judgment.

In order to ensure compliance with the Final Judgment, Section X gives the United States various rights, including inspection of defendants' records, the ability to conduct interviews and take sworn testimony of defendants' officers, directors, employees and agents, and to require defendants to submit written reports. These rights are subject to legally recognized privileges, and information the United States obtains using these powers is protected by specified confidentiality obligations, which do permit sharing of information with the FCC under a customary protective order issued by that agency or a waiver of confidentiality. Under Section III.B, purchasers of the Cellular System Assets must also agree to give the United States similar access to information.

The Court retains jurisdiction under Section XI, and Section XII provides that the proposed Final Judgment will expire on the tenth anniversary of the date of its entry, unless

extended by the Court. Although the required divestitures will be accomplished in a considerably shorter time, defendants are also precluded from reacquiring the divested properties within the term of the decree.

#### **F. Divestiture-Related Developments Since the Complaint was Filed**

On April 5, 1999, Ameritech announced that it has agreed to sell 20 of its cellular telephone systems to a venture owned 97% by GTE and 7% by Georgetown Partners, for \$3.27 billion. The systems being sold, according to Ameritech, cover a population of 11.4 million, and have nearly 1.5 million subscribers.<sup>8</sup> This agreement, of which the United States was notified on April 7, 1999, pursuant to Section VI.A of the proposed Final Judgment, is contingent on the closing of the merger between SBC and Ameritech. It is intended to eliminate all of the cellular overlaps alleged in the complaint and to satisfy all of the divestiture requirements of the proposed Final Judgment.<sup>9</sup> Ameritech will continue to provide services to its cellular customers until the closing of the merger. Up to 1,700 Ameritech employees of the cellular systems will be transferred to GTE as a result of the sale.

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<sup>8</sup> GTE's announcement of the sale estimated that the cellular systems being transferred were slightly larger, covering a population of 12.9 million and having 1.7 million subscribers.

<sup>9</sup> In addition to the 17 cellular telephone systems in Overlapping Markets that are specified in the proposed Final Judgment, Ameritech and the purchasers agreed to include in the sale three other cellular telephone systems, in parts of the Indiana 1, Illinois 4, and Illinois 7 RSAs, which have been operated in close association with the other properties being sold. The inclusion of these additional properties in the agreement also has the effect of eliminating a limited overlap between Ameritech and SBC in part of the area of the Illinois 4 RSA.



The United States will evaluate this proposal for sale of the cellular systems, pursuant to Sections IV and VI of the proposed Final Judgment. Under the schedule specified by Section VI, the United States' evaluation of the acceptability of this proposal is likely to be completed before the 60-day period for comments pursuant to the APPA has expired.

#### **IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS**

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages that the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendants.

#### **V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT**

The plaintiff and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Donald J. Russell  
Chief, Telecommunications Task Force  
Antitrust Division  
United States Department of Justice  
1401 H Street, N.W., Suite 8000  
Washington, D.C. 20530

The proposed Final Judgment provides, in Section XI, that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate to carry out or construe the Final Judgment, to modify any of its provisions, to enforce compliance, and to punish any violations of its provisions.

## **VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT**

The United States considered, as an alternative to the proposed Final Judgment, seeking an injunction to block consummation of the merger and a full trial on the merits. The United States is satisfied, however, that the divestiture of cellular system assets and other relief

contained in the proposed Final Judgment will preserve competition in the provision of wireless mobile telephone services in the Overlapping Markets. This settlement will also avoid the substantial costs and uncertainty of a full trial on the merits on the violations alleged in the complaint. Therefore, the United States believes that there is no reason under the antitrust laws to proceed with further litigation if the divestitures of the cellular system assets are carried out in the manner required by the proposed Final Judgment.

## **VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT**

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court *may* consider --

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint

including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."<sup>10</sup> Rather,

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its

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<sup>10</sup> 119 Cong. Rec. 24598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. 93-1463, 93d Cong. 2d Sess. 8-9 (1974), *reprinted in* U.S.C.C.A.N. 6535, 6538.

responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981)); *see also Microsoft*, 56 F.3d at 1460-62. Precedent requires that

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.<sup>11</sup>

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<sup>11</sup> *Bechtel*, 648 F.2d at 666 (emphasis added); *see BNS*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette*, 406 F. Supp. at 716. *See also Microsoft*, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. American Tel. & Tel Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983) (quoting *Gillette Co.*, 406 F. Supp. at 716); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Moreover, the court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

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inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

## VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment. Consequently, the United States has not attached any such materials to the proposed Final Judgment.

Dated: April 16, 1999

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Joel I. Klein  
Assistant Attorney General

\_\_\_\_\_/s/\_\_\_\_\_  
A. Douglas Melamed  
Principal Deputy Assistant Attorney General

\_\_\_\_\_/s/\_\_\_\_\_  
Constance K. Robinson  
Director of Operations and Merger Enforcement

\_\_\_\_\_/s/\_\_\_\_\_  
Donald J. Russell  
Chief  
Telecommunications Task Force

\_\_\_\_\_/s/\_\_\_\_\_  
Laury E. Bobbish  
Assistant Chief  
Telecommunications Task Force

\_\_\_\_\_/s/\_\_\_\_\_  
Carl Willner  
D.C. Bar # 412841  
Michael D. Chaleff  
Juanita Harris  
John M. Lynch  
D.C. Bar # 418313  
Anne M. Purcell  
Trial Attorneys

Department of Justice  
Antitrust Division  
Telecommunications Task Force  
1401 H Street, N.W., Suite 8000  
Washington, D.C. 20530  
(202) 514-5813